

Virsemi Management (S) Pte Ltd v Welltech Construction Pte Ltd and another suit
[2012] SGHC 207

Case Number : Suit No 63 of 2012 (Summons No 829 of 2012) and Suit No 64 of 2012 (Summons No 869 of 2012 and Summons No 985 of 2012)
Decision Date : 16 October 2012
Tribunal/Court : High Court
Coram : Quentin Loh J
Counsel Name(s) : Andrew J Hanam (Andrew LLC) for the plaintiff; Ramalingam Kasi (Raj Kumar) for the defendant in Suit No 63 of 2012; Cheah Kok Lim (Cheah Associates LLC) for the defendant in Suit No 64 of 2012.
Parties : Virsemi Management (S) Pte Ltd — Welltech Construction Pte Ltd

Conflicts of laws – Restraint of foreign proceedings – Natural forum

Contract – Remedies – Injunction

Tort – Inducement of breach of contract

16 October 2012

Quentin Loh J:

1 This is a case involving overseas training centres for the training, testing and certification (under the requirements of the Building and Construction Authority (“BCA”)) and subsequent mobilisation of construction workers from Bangladesh to Singapore.

2 There were three applications in these two actions before me:

(a) In Suit No 63 of 2012 (“Suit 63”), Virsemi Management (S) Pte Ltd (“Virsemi”) sued Welltech Construction Pte Ltd (“Welltech”) (both being Singapore-incorporated companies) for an injunction to restrain Welltech from interfering with an agreement entered into between Virsemi and Gazipur Air Express International on or about 26 April 2009, (“the Gazipur Agreement”) in general, and in particular to allow Virsemi to resume registration of certain tests, processing the test results and to mobilise the workers who have passed the test, or alternatively for unlawful interference with the operation of the Gazipur Agreement, as well as for damages and an account of profits.

(i) In Suit 63, Welltech took out an application, Summons No 829 of 2012 (“Summons 829”) to stay Suit 63 on the ground of *lis alibi pendens* and/or *forum non conveniens* and to extend time to file its defence until Summons 829 was disposed of.

(b) In Suit No 64 of 2012 (“Suit 64”), Virsemi sued Ferdous Ahmed Badel (who claims it should be spelt “Fardous Ahamad Badal”) trading as Gazipur Air Express International (“Badel” or “Gazipur” as the case may be), a sole proprietorship registered in Dhaka, Bangladesh, for wrongful termination and/or breach of the Gazipur Agreement, an injunction to restrain Gazipur from terminating the Gazipur Agreement in general and in particular to allow Virsemi to resume registration of certain tests, processing the test results and to mobilise the workers who have

passed the test under the Gazipur Agreement, and for damages and an account of profits.

(i) In Suit 64, Virsagi took out an application, Summons No 869 of 2012 ("Summons 869"), for an interlocutory injunction restraining Gazipur from bringing any worker tested at the Welltech Test Centre (also referred to as "WTPL's OTC" in these grounds of decision) in Dhaka, Bangladesh into Singapore unless Gazipur complied with the Gazipur Agreement and included Virsagi in its overseas testing centre business in Dhaka, Bangladesh; alternatively, that Gazipur provides security in the sum of \$1,224,000 every six months in lieu of an interlocutory injunction; and

(ii) Gazipur has taken out an application, Summons in Chambers 985 of 2012 ("Summons 985"), to stay Suit 64 on the ground of *lis alibi pendens* and/or *forum non conveniens* and to extend time to file a defence until Summons 829 is disposed of.

3 After hearing the parties, I dismissed Virsagi's application in Summons 869 and granted Gazipur's and Welltech's applications in Summons 985 and Summons 829 respectively for a stay in Suit 63 and Suit 64 with the usual cost orders in favour of the successful parties. Virsagi has appealed against my decision and I set out the reasons for my decision.

Facts

The joint venture for overseas test centres

4 The facts in [4] to [9] herein are not in dispute. In 2006, the BCA invited companies to set up authorised overseas test centres ("OTCs") in India and Bangladesh in a bid to get workers for the construction industry to be trained, tested and certified before bringing them into Singapore. Welltech was established in the construction industry in Singapore and met the eligibility criteria set out by the BCA. Virsagi had the necessary expertise in operating an OTC but did not meet BCA's criteria. Virsagi's Mr Victor Lee ("Victor") approached Welltech to collaborate. Welltech agreed.

5 On 6 December 2006, BCA granted Welltech approval to operate an OTC in Dhaka, Bangladesh ("Dhaka"). This approval or licence was for 3 years from 6 December 2009 and would be reviewed on a yearly basis thereafter. It was a condition of the approval that Welltech set up a company in Bangladesh to manage the OTC and retain at least a 30% shareholding.

6 Virsagi introduced a Bangladesh company, Rupsha Overseas Ltd, ("Rupsha"), to Welltech to be their local partner for the joint venture. A joint venture company was incorporated on 25 November 2011 and called Welltech Test Pvt Ltd ("WTPL"). An agreement, which was undated, was entered into between Welltech, Virsagi and Rupsha ("the Rupsha Agreement"), and this was submitted to the BCA by Welltech in a letter dated 24 November 2006. One Mr Jalal Yunus, a director of Rupsha, signed the Rupsha Agreement on behalf of Rupsha.

7 Sometime in early 2007, Virsagi and Welltech entered into a written agreement ("the Principal Agreement"), the relevant terms of which were:

(a) A joint venture company, to be called WTPL, was to be incorporated with Virsagi holding 40%, Welltech holding 30% and the local partner holding the remaining 30% of the share capital;

(b) Virsagi would bear all costs and expenses in the set up of WTPL and the OTC – Welltech was not required to put in any funds for this purpose;

- (c) Virsagi would establish the OTC, obtain all government, regulatory and other approvals required in Bangladesh to establish and operate an OTC;
- (d) Welltech would receive a payment of \$200 per worker who passed the test;
- (e) The agreement was not terminable for the first 3 years. Thereafter either party could terminate the agreement by serving 6 months' notice to the other party;
- (f) The agreement was governed by Singapore law and the parties irrevocably submitted to the non-exclusive jurisdiction of Singapore courts.

8 Virsagi entered into an agreement dated 26 April 2007 with a local partner in Dhaka, GN International, to establish the OTC ("the Virsagi-GNI Agreement"). The OTC was duly set up and put into operation. As mentioned above (at [6]), WTPL was incorporated in Dhaka in November 2007. WTPL's shares were held by representatives of the participant companies of the joint venture and not the participant companies themselves as provided for in the Principal Agreement (see [7(a)] above). Hence, out of the 100 shares that were issued, Victor held 40 shares as a representative of Virsagi, Mr Woon Wee Phong, a director of Welltech, held 30 shares and Badal/Gazipur held or came to hold 30 shares. Welltech and Badal further contend that WTPL remained dormant and operations and payments to and from the OTC ("WTPL's OTC") were made independently of WTPL between the parties by mutual agreement.

9 By a letter dated 10 January 2011, Welltech served a written notice of termination of the Principal Agreement as required under Clause 7 of the said agreement. Although Clause 11 of the Principal Agreement provided for a notice period of 6 months, at Victor's request, Welltech extended the termination date to 31 December 2011. It is not disputed by any party that the Principal Agreement was validly brought to an end by Welltech on 31 December 2011.

10 Welltech alleged that the Rupsha Agreement was not properly implemented and without its knowledge, Rupsha was replaced with GN International and yet later with Gazipur. Welltech further alleged that Virsagi did not provide any funds and it later found out that almost all the funds were put up by Gazipur. Virsagi pleaded in Suit 64 that on or about 26 April 2009, GN International's responsibilities under the Virsagi-GNI Agreement were assigned to Gazipur. Pursuant to this, Virsagi and Gazipur entered into the Gazipur Agreement.

11 Virsagi's claims against Welltech did not, and indeed could not, arise under the Principal Agreement as all parties accept that the Principal Agreement was lawfully brought to an end on 31 December 2011. Virsagi instead sued Welltech in tort for inducing a breach of Gazipur Agreement and for unlawful interference with that agreement. Virsagi alleged that Welltech had taken steps together with Gazipur, to set up another OTC called Welltech Education Centre Pvt Ltd to divert the training and testing of workers away from WTPL, thereby bypassing Virsagi. Virsagi therefore sought an injunction to restrain Welltech from interfering with the Gazipur Agreement in general and in particular to allow Virsagi to resume registration for the tests, processing of test results and mobilisation of workers who have passed the tests as these were within Virsagi's scope of works under the Gazipur Agreement.

The Gazipur Agreement

12 The relevant portions of the Gazipur Agreement are as follows:

- (a) Clause 1, the "Introduction" clause to the Gazipur Agreement, recited some background to

the BCA approving the setting up of overseas test centres, including those in Dhaka, Bangladesh and states that Virsagi, "... thru its nominee, WellTech Construction Pte Ltd, applied to set up a new OTC's it has since been successful, and has now obtained an in principle approval from BCA".

(b) In Clause 3, the subject matter was described as an "agreement to establish a BCA approved OTC in Dhaka Bangladesh as well as facilities for training or workers to take the test at the OTC and the mobilization of the workers to work in Singapore";

(c) In Clause 4, the Gazipur Agreement provided that Gazipur had to deal with all the paperwork and permits from the Government of Bangladesh, procure a piece of land and erect a building suitable for the OTC at its cost, have the capacity to accommodate 500 workers, take full responsibility for the OTC as Virsagi will only be working from the Singapore side, train up the required number of workers with 3 months training and testing, make all payments for the registration and mobilization of the workers, pay the annual fee for the BCA test computers, pay \$1,000 per month and all air fare, accommodation, meal and transport costs for Virsagi's "Liaison Person" who is "to support" the BCA test (ie the tests to the standards or requirements set by the BCA), and comply fully with all instructions and directions that were given by the BCA and Welltech;

(d) Under Clause 5, Virsagi had to respond to the BCA as necessary, send its employee to Dhaka each month "to support the BCA test", process the test results, and mobilize workers to work in Singapore as soon as they passed their tests including arranging for approval for these workers to be employed in Singapore;

(e) Under Clause 6, Gazipur was to be fully responsible for the entire cost of training and testing the workers in Dhaka, including payment of fees to Virsagi for registration and BCA test fees;

(f) Under Clause 7, Gazipur had to send the list of workers who pass their tests with \$1,000 per worker to Virsagi for the latter to obtain in-principle approval ("IPA") from the Ministry of Manpower for their employment in Singapore. Upon receiving IPA, Gazipur would pay the remaining balance of \$3,130 per worker 5 days before their flight to Singapore;

(g) Clause 12 was a termination clause which provided:

This agreement is non terminable so long as the Second Party [Virsagi] principal continues to possess a license for the testing or worker. However, if the license obtained by the Second Parties is cancelled for any reason whatsoever, then the agreement is deemed to be cancelled, and its provision is rendered null and void.

(h) Clause 14 provided:

For the avoidance of doubt, the Parties have an exclusive relationship with one another in respect of their operations at the training and test centre known as the WellTech Test Centre.

(i) Clause 16, the "Governing Law" clause, read:

The parties hereto agree that matters pertaining to the training of workers in Dhaka, the operations of the WellTech test centre, the mob of workers to the centre for training, i.e., matters arising on the Dhaka side shall be governed by the laws of Bangladesh. On the other

hand, matters pertaining to the registration of workers for test, the rules and directions of the BCA and the license, etc i.e. matters arising on the Singapore side shall be governed by the laws of Singapore.

13 It should be mentioned that the Virsagi-GNI Agreement was very similar to the Gazipur Agreement. It provided that GN International would procure the land and construct the OTC building at its own cost and Virsagi would invest a sum equivalent to S\$200,000 to equip the OTC. There was an apparent falling out between Mr Aminul Hossain Sarker ("Mr Sarker") of GN International and Badal, who was also a partner in GN International, and a fresh agreement – the Gazipur Agreement – thus came into being.

14 Welltech contended that Virsagi entered into these agreements without its knowledge or participation and Welltech was not a party to the same and denied that it was ever a "nominee" of Gazipur as set out in the recital at [12(a)] above.

15 The commercial attraction of the venture to Welltech was that it did not have to come up with any funds or expend much time effort to run this venture in Bangladesh. It merely had to obtain the BCA licence and everything else would be run by Virsagi and Welltech would be paid \$200 per worker. Virsagi would have to find the local Bangladesh partner, who would then secure the land, construct the OTC building to accommodate 500 workers at a time, operate the test centre and liaise with the Bangladesh authorities. It appears, and it is not necessary for me at this stage to make any findings on this score, that Virsagi got the Bangladesh party to obtain the land, erect the building and was itself paid a sum of money per worker, but Virsagi was of course much more involved in the testing of workers, obtaining certification for the workers and in the mobilisation of these workers to Singapore. Virsagi was paid fairly significant sums per worker, although some of which went towards defraying the costs of housing the worker and putting the worker through the tests at the OTC.

16 There were some further factual allegations that should be set out for completeness at this interlocutory stage:

(a) In a court document (that bore resemblance to a petition) filed in Company Matter No 8 of 2012 in the High Court Division of the Supreme Court of Bangladesh at Dhaka ("Dhaka CM 8/2012"), Victor sued WTPL as 1st Defendant, Mr Woon Wee Phong as 2nd Defendant and Badal as 3rd Defendant; (there were other respondents, referred to as "pro-forma parties" like the Registrar of Joint Stock Companies, the Secretary, Ministry of Expatriates, Welfare and Overseas Development, Bangladesh Secretariat, and the Director General, Bureau of Manpower, Employment and Training, stated to be added for efficacious disposition of the proceedings, but no issues arise on that score). Victor's action was based on the minority oppression provision, section 233, of the Bangladesh Companies Act.

(b) Dhaka CM 8/2012 stated that originally, Virsagi entered into an agreement with Rupsha for the establishment of the OTC on 24 November 2006 in anticipation of Welltech obtaining the licence to do so from BCA. Rupsha was subsequently no longer interested to collaborate with Virsagi and Welltech (Welltech denies any knowledge of this), and Virsagi approached (although it should be noted that the language used in Dhaka CM 8/2012 was ambiguous and it could be interpreted to mean Welltech and Virsagi made a joint approach to) GN International to collaborate as the local partner. It was also alleged that Badal, a partner in GN International, had his own recruitment licence from the Bangladesh authorities under "The Gazipur Air International". Dhaka CM 8/2012 went on to state that an agreement was entered into between Gazipur and GN International, whose managing partner was Mr Sarker.

(b) This agreement between "...Sarker, Managing Partner, GN International..." and Virsagi, (ie the Virsagi-GNI Agreement) was dated 26 April 2007.

(c) Dhaka CM 8/2012 also stated that WTPL was set up with the representatives of the participant companies holding its shares (as stated at [8] above), but explained that GN International's shares were issued in the name of Badal, one of the partners of GN International. It did not otherwise explain why Mr Sarker's name was not used.

(d) Dhaka CM 8/2012 then stated that the monies collected for the purposes of WTPL's OTC and the training, testing and mobilisation of the workers were not banked into WTPL's bank account but was, by mutual agreement, disbursed amongst Welltech, Virsagi and GN International.

(e) Dhaka CM 8/2012 also stated that since January 2009, certain differences arose between the shareholders of WTPL and it was said that the disputes arose because Badal wanted to replace GN International with Gazipur as the local partner.

(f) This explained why the Gazipur Agreement, dated 26 April 2009, contained Recital (d) which referred to Sarker's inability to discharge its obligations and that Gazipur was brought in as a substitute. Recital (d) also provided that if Mr Sarker or GN International sought legal redress against Virsagi in the Bangladeshi courts, Gazipur would be liable for all expenses or payments that were made to Mr Sarker or GN International.

(g) Dhaka CM 8/2012 also recited that, (and unfortunately the document is badly photocopied and cut-off at the end, but doing the best interpolation that I can), Badal began to deal with Welltech circumventing Virsagi. It also stated that Badal sought to do business with one Mr Taneem Hasan, with whom Virsagi had disputes. Consequently, to settle these disputes, Virsagi and Gazipur entered into the Gazipur Agreement and later a Supplementary Agreement dated 19 August 2009.

The Bangladesh proceedings: Dhaka CM 8/2012

17 Virsagi did not dispute that Victor commenced Dhaka CM 8/2012 on 5 January 2012 in the Supreme Court of Bangladesh, High Court Division (Statutory Original Jurisdiction) in Dhaka ("Dhaka High Court"). Its complaint was that the other majority shareholders were carrying out the business of an OTC and mobilising workers with other parties without the participation of WTPL and Virsagi. Virsagi sought in Dhaka CM 8/2012:-

(a) a direction to the other shareholders of WTPL "... to continue their business as an Overseas Testing Centre in Bangladesh through [WTPL] with the active participation of the petitioner";

(b) pending Dhaka CM 8/2012, an ad-interim order restraining Mr Woon Wee Phong and Badal "from doing Overseas Testing Center business in Bangladesh for export of manpower to Singapore by themselves, or through any company in which they are an officer or a shareholder, except through the Overseas Testing Centre operated by [WTPL] and with the active participation of the petitioner".

18 On 9 January 2012, Victor obtained an ad-interim order from the Dhaka High Court restraining Welltech and Gazipur from doing OTC business in Bangladesh for export of manpower to Singapore by themselves or through any company except through WTPL and with the active participation of Virsagi/Victor Lee. It appeared that a stay on this order was granted on 15 January 2012.

19 It is of some significance that Dhaka CM 8/2012 also referred to some further factual allegations:

(a) there was a reference at paragraphs 12 to 14 of Dhaka CM 8/2012 that when Welltech terminated the Principal Agreement, there was some offer that Virsagi's shares in WTPL be bought over by the other two shareholders;

(b) it was alleged that there was a subsequent agreement (which appeared to be partly oral and partly confirmed in certain emails between the parties) for Welltech and Gazipur to buy out Virsagi at a price equivalent to \$250 per worker who passed the tests at WTPL's OTC in 2012 and subject to the condition that WTPL and Badal did not do any business with Mr Taneem Hasan and thereafter Victor's role was subsequently carried out by a person named Mr L K Peh;

(c) Victor alleged that he subsequently found out that Badal was engaged in business with Mr Taneem Hasan and a meeting was held in Singapore between Virsagi and Welltech in November 2011;

(d) Victor then made further allegations of, *eg*, his concerns of Mr Taneem Hasan's use of the WTPL's OTC and his discovery of a transfer of business from WTPL's OTC to somewhere else. A disagreement later broke out and Victor withdrew his offer to sell Virsagi's shares in WTPL.

20 There was an affidavit filed by Mr Muntasir Uddin Ahmed on 23 February 2012 which deposed to the backlog facing the judiciary of Bangladesh. He stated that for civil cases involving a "money suit", it would take 5 to 10 years in Bangladesh before the outcome would be known.

21 Notwithstanding this, the Dhaka High Court delivered its judgment in Dhaka CM 8/2012. The written judgment recorded that Dhaka CM 8/2012 was heard on 15 and 16 April 2012 and a written judgment was delivered on 21 June 2012. In a detailed 22-page judgment, Abdur Rahman J found, *inter alia*, that WTPL was a non-functioning company, Victor and Badal were running the OTC business under a private arrangement, Mr Woon Wee Phong (of Welltech) was only liable to lend its licence from the BCA for establishing and running the OTC business in Dhaka and the OTC business set up under the private arrangement had no connection with WTPL. Abdur Rahman J dismissed the petition for minority oppression and discharged the injunction. The Dhaka High Court also stated that the respondents, Mr Woon Wee Phong (of Welltech) and Badal were free to continue with the business of the OTC in accordance with the private arrangement between the parties. Victor has appealed against the Dhaka High Court's decision and the appeal is pending.

Analysis

22 Having set out these undisputed facts and factual allegations, I now turn to the applications before me.

Lis Alibi Pendens

23 Virsagi accepted that there were identical parties in Dhaka CM 8/2012 and Suit 63 and Suit 64 but contended that the issues of fact and law to be determined were different. Although the issues to be decided between Virsagi and Welltech (which lay in tort) and that between Virsagi and Gazipur (which lay in contract) were different, the relief claimed against Welltech and Gazipur was substantially the same – Virsagi wanted to ensure Welltech could only carry on OTC business in Bangladesh with Badal with the involvement of Virsagi and could not exclude Virsagi.

24 Virsagi's primary claim against Welltech in Suit 63 was framed as follows:

An injunction to restrain [Welltech] from interference with the operation of the Gazipur Agreement in general and *in particular to allow [Virsagi] to resume registration for the tests, processing the test results and to mobilize the workers who have passed the test*, being [Virsagi's] scope of works under the Gazipur Agreement.

[emphasis added]

Virsagi's other claims against Welltech were for damages and an account of profits from the registration and mobilisation of workers.

25 Virsagi's primary claim against Gazipur in Suit 64 was framed as follows:

An injunction to restrain [Gazipur] from terminating the Gazipur Agreement in general and *in particular to allow [Virsagi] to resume registration for the tests, processing the test results and to mobilize the workers who have passed the test*, being [Virsagi's] scope of works under the Gazipur Agreement.

[emphasis added]

Virsagi's other claims against Gazipur were also for damages and an account of profits from the operation of WTPL's OTC and any other OTC formed with Welltech.

26 Virsagi's reliefs claimed against WTPL, Mr Woon Wee Phong and Badal in Dhaka CM 8/2012 have been set out above (at [17]) and it would be seen that they were substantially the same as the reliefs claimed in Suit 63 and Suit 64. The essential three-party arrangement between the parties cannot be overlooked although it had been broken down into the Virsagi-Welltech component (with Welltech holding the BCA licence and Virsagi with the Bangladesh connections and the ability to run the business in Dhaka) and the Virsagi-Bangladesh Party component (with Virsagi having the BCA "contact" in Singapore and offering the Bangladesh partner a share in exchange for getting the land, putting up the building and obtaining the Bangladesh approvals) and hence the very bare tri-partite agreement over the joint-venture vehicle, the Rupsha Agreement. Virsagi chose to split this arrangement into two contracts in all probability for its own commercial relevance and protection. Welltech had the BCA licence to offer and Badal had the land, the building, funding in Bangladesh and ability to obtain regulatory approval for the project. Virsagi could do neither of these. This scheme could not work without Badal or Welltech, but it could, without Virsagi. Unfortunately for Virsagi, it did not secure itself as far as Welltech was concerned, for longer than the three years set out in the Principal Agreement.

27 The law on *lis alibi pendens* is settled and has been authoritatively set out by the Court of Appeal in *Yusen Air & Sea Services (S) Pte Ltd v KLM Royal Dutch Airlines* [1999] 2 SLR(R) 955 ("*Yusen v KLM*"). Virsagi conceded that the first element, *ie* that the parties before the courts of Singapore and Bangladesh are the same, was satisfied. As noted above (at [23]), Virsagi's main contention was that the facts and issues in the two sets of proceedings were different. I was of the view that this was not so. In Singapore, Virsagi sued in Suit 63 Welltech in tort for inducing a breach of contract or unlawful interference with a contract (*ie* the Gazipur Agreement), and Virsagi sued Badal in Suit 64 for breaching that same contract and for an injunction ordering Badal to perform that contract. Before the Dhaka High Court, Virsagi claimed the same relief against the same "defendants". The common issues before the Singapore court and the Dhaka High Court are – (i) is Virsagi entitled to insist that Badal/Gazipur continue with the Gazipur Agreement when the Principal Agreement has

been validly terminated and (ii) in these circumstances, whether Welltech and Badal/Gazipur could carry on OTC business in Dhaka without involving Virsagi. The remedy sought was the same. Moreover, the issues arose from the same factual matrix. Had the issue of *lis alibi pendens* been the only issue before me, I would have been prepared to grant a stay of Suit 63 and Suit 64 on the facts as they appeared at this stage.

Forum Non Conveniens

28 Even if the *lis alibi pendens* ground had not been made out, Welltech and Gazipur made compelling arguments for a stay of proceedings on the basis of *forum non conveniens*. Again the law in this regard is settled: see *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 2 SLR(R) 148, *Yusen v KLM* and *Rickshaw Investments Ltd & Anor v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 and the application of the well-accepted *Spiliada* principles in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460. These authoritative precedents direct that I should consider, at the first stage (in determining whether Singapore is the appropriate forum), factors such as whether there is another more appropriate forum, the general connecting factors, the jurisdiction where the tort occurred or where the contract was made or operates, the choice of law clause, the effect of the concurrent proceedings in Bangladesh, and in Singapore, the factual disputes that will arise in these proceedings, the location of witnesses and the location of the evidence.

29 Welltech submitted that it was the party holding the BCA approval or licence to run an OTC in Bangladesh. Its agreement with Virsagi (*ie* the Principal Agreement) was validly brought to an end. Virsagi had no claim in contract against Welltech. The Principal Agreement did not provide for the dissolution of WTPL. From the evidence before me, and as found by the Dhaka High Court, WTPL was a dormant company as the parties chose to deal with the money payments independent of WTPL. WTPL was a company incorporated in Bangladesh.

30 Virsagi's claim against Welltech lay in the tort of inducing a breach of the Gazipur Agreement or unlawful interference with the Gazipur Agreement and it is to that agreement that I now turn.

31 The subject matter of the Gazipur Agreement was expressed at Clause 3 to be the establishment of a BCA-approved OTC in Dhaka and facilities for the training and testing of workers and the mobilisation of workers to Singapore. A "BCA-approved OTC in Dhaka" was therefore, in my view, a crucial foundational element. Without a BCA-approved OTC and a BCA licence holder, there would have been no point testing workers as none of those tests would have been recognised in Singapore nor would they have aided or enabled such workers to come to Singapore. Virsagi and Gazipur together could not establish a BCA-approved OTC. They needed Welltech or someone like Welltech to participate and offer a BCA licence. Under the Gazipur Agreement, Virsagi no longer had a "nominee" (see Clause 1(c)) or a "Second Party principal" (see Clause 12). There were other provisions within the Gazipur Agreement that could no longer operate and were rendered meaningless when the Principal Agreement came to an end. For example, Clause 4(i) of the Gazipur Agreement provided that Gazipur had to comply fully with all instructions and directions given by BCA and Welltech. However no instruction or directions would have been forthcoming on termination of the Principal Agreement. Turning to Clause 5(a) of the Gazipur Agreement, which set out Virsagi's obligation to respond to BCA as necessary including attending their meetings in Singapore and relating information or instructions from the BCA to Gazipur – similarly there would be no such meetings as Virsagi was not recognised by the BCA. Any tests carried out by Virsagi and Gazipur without Welltech's BCA Licence after 31 December 2011 would not be recognised by BCA unless they could secure another BCA-approved licence holder. Without a BCA-recognised test, no workers would be mobilised to Singapore.

32 Virsagi submitted that under Clause 12, the Gazipur Agreement was "...non terminable so long as the Second Party principal continue[d] to possess a license for the testing or worker." The "Second Party" referred to in the Gazipur Agreement was Virsagi but the agreement did not state who the "Second Party principal" was. In Clause 1 or the "Introduction" clause to the Gazipur Agreement, as previously noted, Welltech was described as Virsagi's "nominee". Welltech was obviously no longer a "nominee" if indeed it could be so described in the first place. More importantly, Clause 12 went on to provide that if the licence obtained by the "Second Parties" (which was again not defined) "... [was] cancelled for any reason whatsoever, then the agreement [was] deemed to be cancelled, and its provision rendered null and void." Gazipur forcefully argued that the Gazipur agreement came to an end when the Principal Agreement came to an end. Virsagi strenuously maintained that since Welltech still held a licence, the Gazipur Agreement was not at an end.

33 With respect, I could not see how it could be contended that the Gazipur Agreement was still in force, capable of practical implementation and therefore enforceable. However I note that Clause 16 of the Gazipur Agreement provided that all matters that pertained to the training of workers in Dhaka, the operations of WTPL's OTC, the mobilisation of workers to the centre for training, or "...matters arising on the Dhaka side..." shall be governed by the laws of Bangladesh. No evidence was put before me on what the law of Bangladesh was on the issue of whether the Gazipur Agreement survived termination. The only assistance that I could glean was that the Dhaka High Court had, in dismissing Victor's claim for relief from minority oppression, specifically ruled that the respondents were at liberty to continue with the business of running an OTC in accordance with private arrangement between the parties. That decision has of course been appealed.

34 The second half of the governing law clause in Clause 16 did not apply as it stated that in "...matters pertaining to the registration of workers for tests, the rules and directions of BCA and the licence, etc, matters arising on the Singapore side shall be governed by the laws of Singapore."

35 Virsagi was in effect asking for a backdoor continuation or enforcement of the Principal Agreement and for the implication of restraint of trade covenants in its agreements with Gazipur and Welltech, *viz*, to ensure that Welltech could only carry on OTC business in Bangladesh through WTPL with Gazipur *and* Virsagi as long as Welltech had the BCA licence. Even if Welltech was no longer obliged to work with Virsagi, Virsagi was seeking to ensure that Gazipur was bound not to work with anyone else, including Welltech, in the OTC business.

36 In addition to these factors and considerations, I took the view that Bangladesh was the more appropriate forum to determine these disputes:

(a) The Gazipur Agreement was signed in Bangladesh with a Bangladesh national or resident, Badal or his sole proprietorship, Gazipur. The breach of the Gazipur Agreement, if any, occurred in Bangladesh. The interference with the Gazipur Agreement, if any, would operate in Bangladesh. The Gazipur Agreement was governed by the law of Bangladesh and under its express provision, Gazipur took full responsibility for WTPL's OTC as Virsagi would only be working on the "Singapore side".

(b) The Gazipur Agreement dealt with operations in relation to recruitment of workers, accommodation, training, testing, certification and mobilisation of workers in Bangladesh. All payments collected from the workers and disbursements or payments were also made in and from Bangladesh and bank accounts in Bangladesh. The allegations of continuing breaches related to the training, testing and certification and mobilisation of Bangladesh workers in Dhaka and the alleged use of WTPL's OTC to the exclusion of Virsagi.

- (c) Any accounts, papers and other documents relating to the dispute are in Bangladesh.
- (d) WTPL was a Bangladeshi corporation and any issues in relation to its operation or otherwise lie in Bangladesh.
- (e) The setting up of WTPL's OTC, the land on which it sits, the licences obtained or obtainable, the payments for these items, the payments or reimbursement for the purchase of training equipment were all made in Bangladesh and the evidence thereof, including bank accounts and ownership records for the training equipment, WTPL's OTC, the building and the land on which it sits, lies in Bangladesh.
- (f) The relevant witnesses involved in this dispute are in Bangladesh given that the factual background and matters set out at [15] and [19] above deal with individuals or entities or events that occurred in Bangladesh and the multiple agreements between Gazipur and other Bangladeshi parties like Rupsha, Rupsha's director Mr Jalal Yunos, GN International, Mr Sarker, Badal and Gazipur.
- (g) The defendant in Suit 64, Badal/Gazipur, is resident in Bangladesh.
- (h) There are also factual disputes over how Rupsha came to be substituted with GN International which was in turn substituted with Gazipur. There was also an alleged supplementary agreement dated 19 August 2009 entered into between Virsagi and Badal to resolve the issue of admitting two new partners, Mr Arifur and Mr Monir, the payment to Virsagi for the purchase of the equipment for WTPL's OTC and Badal's alleged ownership of the land, WTPL's OTC building and the equipment therein. Badal's alleged ownership of the land, WTPL's OTC building and the equipment is a disputed issue between Virsagi and Badal/Gazipur, and the evidence and witnesses relevant to this dispute are in Bangladesh.
- (i) There are further factual disputes over the alleged buy-out of Victor, whether there was a concluded agreement to do so and whether Victor could allegedly and unilaterally terminate that agreement as well as the alleged ties between Badal/Gazipur with Mr Taneem Hassan who was also allegedly running another overseas training centre in Dhaka in competition with Virsagi. Evidence in relation to this dispute also lies in Bangladesh.
- (j) There is already an action in Dhaka in relation to WTPL and its shareholders which is now on appeal. That action was initiated by Virsagi before these proceedings in Singapore. In addition, Virsagi's claims of delays in the judicial process in Bangladesh have not been borne out,
- (k) As noted above, Virsagi originally obtained an injunction in Dhaka to restrain Welltech and Badal/Gazipur from testing workers in Bangladesh or through any company other than WTPL set up pursuant to the Principal Agreement but this injunction was stayed on 15 January 2012. I note that Virsagi then commenced Suit 64 on 26 January 2012 and filed Summons 869 on 23 February 2012 for an injunction to oblige Badal/Gazipur to comply with the Gazipur Agreement whereas the injunction in Dhaka CM 8/2012 was for an order that the testing of workers was to be carried out by WTPL;
- (l) Badal/Gazipur alleged that Virsagi was behind the issue of an order by the Ministry of Labour and Manpower, Bangladesh on 11 April 2012 temporarily suspending the permission given to Badal/Gazipur to operate WTPL's OTC without prior notice to the latter. Badal/Gazipur have taken out separate judicial review proceedings on 15 April 2012 and the Dhaka High Court has issued a rule nisi calling on the Ministry of Labour and Manpower to show cause for its unilateral

suspension and has in the meantime issued a stay of the suspension. That action is on-going.

(m) Whether the Gazipur Agreement has been unlawfully interfered with by Welltech, and issues on the construction of clauses like the non-termination clause (*ie* Clause 12) and whether it could be construed in the context of the other agreements, like the Principal Agreement, is likely to depend on a resolution of the above factual disputes and the law of Bangladesh.

37 I also note that Virsagi obtained leave to serve the Writ of Summons and Statement of Claim in Suit 64 under O 11 r 1(b), (d)(iii) and (e) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC") in Summons No 488 of 2012 ("Summons 488"). O 11 r 1(b) caters for the situation where an injunction is sought ordering the defendant, *ie*, Badal/Gazipur, to do or refrain from doing anything *in Singapore*. I cannot see what Virsagi is seeking to restrain Badal/Gazipur from doing in Singapore as what Badal/Gazipur have to do under the agreements would be carried out in Bangladesh. As for O 11 r 1(d) (iii), I have already noted that the law of Bangladesh governs the disputes and issues that arise in Suit 63 and Suit 64. As for O 11 r 1(e), I also could not see what breach had been committed by Badal/Gazipur in Singapore nor did I see a breach that occurred in Bangladesh that rendered the performance of so much of the Gazipur Agreement that ought to have been performed in Singapore impossible.

38 Virsagi have not put forward any good reasons to invoke the second stage of the *Spiliada* principles and have failed to persuade me that a stay should not be ordered.

Injunctive Relief

39 As noted earlier (at [37]), in Summons 488 and the accompanying affidavit filed on 1 February 2012, Virsagi sought to serve the Writ of Summons and Statement of Claim in Suit 64 on Gazipur in Bangladesh, relying on, *inter alia*, O 11 r 1(b) of the ROC. Order 11 r 1(b) provides as follows:

... service of an originating process out of Singapore is permissible with the leave of the Court if in the action –

(b) an injunction is sought ordering the defendant to do or refrain from doing anything in Singapore (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);

40 In *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and another appeal* [2006] 1 SLR(R) 112 ("*Karaha Bodas*"), the Court of Appeal adopted the reasoning in *Siskina v Distos Compania Naviera SA* [1979] AC 210 ("*The Siskina*") and *Mercedes Benz AG v Leiduck* [1996] AC 284 that a plaintiff could not obtain a Mareva injunction which was essentially ancillary to proceedings that were pending in a foreign court where the defendant was not subject to the *in personam* jurisdiction of the local court. At [37] of *Karaha Bodas*, the Court of Appeal cited Lord Diplock's comments in *The Siskina* at 256 with regard to O 11 r 1(1)(i) of the English Rules of the Supreme Court (c 54) (UK) ("English RSC") (which is *in pari materia* to our O 11 r 1(b)):

... Lord Diplock [in *the Siskina*] commenting on O 11 r 1(1)(i) of the English RSC stated ([9] *supra* at 256):

The words used in sub-rule (i) are terms of legal art. The sub-rule speaks of "the action" in which a particular kind of relief, "an injunction" is sought. This pre-supposes the existence of a cause of action on which to found "the action." A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is *dependent upon there being a pre-*

existing cause of action against the defendant *arising out of an invasion*, actual or threatened by him, *of a legal or equitable right of the plaintiff* for the enforcement of which the defendant is amenable to the jurisdiction of the court. *The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action.* It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction. ... [T]he thing that it is sought to restrain the foreign defendant from doing in England must amount to the invasion of some legal or equitable right *belonging to the plaintiff in this country and enforceable here* by a final judgment for an injunction.

[emphasis in original]

41 Therefore, an injunction can only be obtained if there is a dispute being substantially litigated in Singapore in which some legal or equitable right of the plaintiff is infringed and which can be protected and enforced in Singapore by a final judgment in Singapore. Although the principle in *The Siskina* applies to Mareva injunctions which are sought against assets of a defendant in Singapore, I find that it applies with even greater force to a mandatory injunction which essentially compels specific performance by the defendant of an agreement in a foreign jurisdiction. Against the backdrop of this analysis, many of the factors cited above from [23] to [38] militate against a finding that Virsagi satisfies the test for a grant of the injunctions prayed for. For the same reasons I have set out above, I do not think there is a serious question to be tried. Applying Singapore Law Virsagi's claims against Welltech and Gazipur are seriously flawed. The disputes between Virsagi and Gazipur can only be properly determined by Bangladeshi law and no evidence of that was put before me. The resolution of the issues outlined above as to breach, inducement of breach of contract and unlawful interference with that contract, cannot be answered without evidence of Bangladeshi law. The remedies and relief claimed by Virsagi also depend on Bangladeshi law. The balance of convenience weighs against Virsagi and so does the element of the adequacy of damages as far as Welltech is concerned as Virsagi have not put any evidence to the contrary before me. Further, Badal/Gazipur have no assets or business in Singapore – they are even further removed than the defendant in *Karaha Bodas*, which was a Hong Kong entity with no presence in Singapore but with assets in Singapore which could form the subject of a Mareva injunction.

42 I also note that the injunction claimed against Badal/Gazipur did not include Welltech but in Dhaka CM 8/2012, Victor applied for an injunction to compel Badal/Gazipur and Welltech to carry on testing and registering of workers through WTPL and to ensure all payments made and received are carried out through WTPL. Further, if Badal/Gazipur's allegations are right (*ie*, that the land, WTPL's OTC and building and the equipment were all paid for by them), then Virsagi's right to injunctive relief is very weak.

43 As a final note, even assuming that the defendant falls within the *in personam* jurisdiction of the court, I observe that Virsagi is in Summons 869 essentially praying for a mandatory injunction for specific performance of the Gazipur Agreement. For a mandatory injunction, the court must be satisfied not only as to the conditions in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, but there is a further threshold that if the injunction is not granted, the plaintiff would suffer "irremediable prejudice" that cannot be put right by damages (*Rikvin Consultancy Pte Ltd v Pardeep Singh Boparai and another* [2010] SGHC 191). It is difficult to see how Virsagi would suffer irremediable prejudice if Badal/Gazipur were not forced to specifically perform the Gazipur Agreement.

Conclusion

44 For the reasons set out above, I dismissed Virsagi's application for a mandatory injunction against Gazipur and granted a stay on the ground of *lis alibi pendens* and *forum non conveniens* on the applications of Welltech in Suit 63 and Gazipur in Suit 64 and hold that the proper forum to deal with the issues between the parties is Bangladesh.

45 I awarded costs fixed at \$8,000 all in to Badal/Gazipur for Summons 869 and Summons 895 and \$4,000 all in to Welltech for Summons 829.

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